STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:	)	Docket No. 01-AFC-17
	)	
Application For Certification of the	)	COMMISSION STAFF'S
Inland Empire Energy Center, LLC	)	POST HEARING BRIEF
	)	
	)	

The Energy Commission Staff ("Staff") offers its Post Hearing Brief following the conclusion of hearings in this matter. With the exception of the issues discussed below, the Applicant, Inland Empire Energy Center, LLC, and Staff are in agreement regarding the conditions of certification to be applied to the project. Until sufficient NOx RECLAIM Trading Credits (RTCs) are identified, however, Staff cannot recommend certification of the project.

In the time between the Prehearing Conference and the Evidentiary Hearing, the Applicant proposed various changes to the Conditions of Certification proposed by Staff. Staff agreed to some of the proposed changes and in some cases proposed modified revisions. Exhibit 68 contains a compilation of all of the proposed Conditions of Certification with the modifications that Staff agreed to make. Those Conditions should be further modified as described below and shown specifically in Attachments A and B to this brief.

I. The Applicant Has Failed to Identify NOx Offsets as Required by the Warren-Alquist Act.

The Warren-Alquist Act, in Public Resources Code Subsection 25523(d)(2), provides, in relevant part:

> The commission may not find that the proposed facility conforms with applicable air quality standards pursuant to paragraph (1) unless the applicable air pollution control district or air quality management district certifies, prior to the licensing of the project by the commission, that complete emissions offsets for the proposed facility have been identified and will be obtained by the applicant within the time required by the district's rules. . . .

Here no such certification has been made by the South Coast Air Quality Management District (“Air District” or “SCAQMD”), nor could such a certification be made under the present facts. The Applicant has failed to identify 452,359 pounds of its first year 490,593 pound NOx offset obligation. Exhibit 68, p. 12, Condition AQ-SC9.

The statute requires that offsets be specifically identified by an applicant prior to the Energy Commission's approval of a license. Here the Applicant has offered only a letter from Cantor Fitzgerald, an offset broker, listing offsets that were available for sale at the time the letter was prepared. Exhibit 54. The identities of the sellers are known only to the broker. July 30, 2003, Hearing Transcript ("HT"), pp. 183, lns. 23-25.[1] Mr. Rubenstein testified that the Applicant does not necessarily intend to purchase the offsets listed in the letter, but will purchase the least expensive offsets available at the time it decides to purchase the offsets it needs to satisfy the Air District's offset requirement. HT, p. 185, lns. 6-13. When specifically asked, Mr. Rubenstein indicated that he was not offering the Cantor Fitzgerald letter to identify specific offsets (HT, pp. 187-188); rather, the letter was offered as evidence that sufficient offsets were available in the market. HT, p. 184, lns. 21-22.

The second part of the required certification is that the offsets "will be obtained by the applicant within the time required by the district's rules." Logically, such a certification requires a measure of certainty that an applicant will be able to follow through and acquire the identified offsets at the required time. The current owner must hold the RTCs free for the applicant to use and cannot sell the offsets to someone else or use them for its own purposes. Only an option or other legally binding commitment to sell to the applicant would provide that certainty. A letter from a broker saying that certain offsets are currently available for purchase does not provide that certainty.

The Applicant suggests that RTCs are different from "conventional" emission reduction credits (ERCs) and should not be treated as an offset under Subsection 25523(d)(2). While there are differences, they are irrelevant to the issue at hand. In order to emit NOx, a facility must possess the necessary amount of RTCs; an RTC is, in effect, a right to emit. If a facility sells an amount of RTCs to the Applicant, it may no longer emit that amount of NOx. Instead, the facility must curtail its operations or increase the efficiency of its emission reduction equipment. Fundamentally this is no different than an ERC. To create an ERC for sale to a power plant developer or some other operator, a facility would need to surrender its right to emit by curtailing its operations or enhancing emission reduction equipment.

The "currency" of an RTC is more flexible in that it can be sold in annual increments while ERCs are sold in perpetuity. That is another irrelevant distinction, however, because RTCs can be sold in perpetuity as well. HT, p. 200, ln. 17 – p. 201, ln. 4. Similarly irrelevant is the way RTCs were originally allocated in the 1990's. Then they were allocated to existing emitters in proportion to their historical emissions. That does not change the present effect of a transfer of an RTC from one party to another—the party selling the RTC must reduce its emissions.

That an RTC is functionally an offset is clear in the Air District's own rule:

[1] The transcript posted on the Energy Commission's web site contains two copies of the full transcript, one following the other. We have not compared the two copies to see if they differ. Our references are to the first copy (pages 1 - 337).

> The Executive Officer shall not approve the application for a Facility Permit authorizing operation of a new or relocated facility, unless the applicant demonstrates that: (A) the facility holds sufficient RECLAIM Trading Credits to offset the total facility emissions for the first year of operation, at a 1-to-1 ratio...
>
> SCAQMD Rule 2005(b)(2).

Staff cannot recommend approval of this project until the required RTCs are identified and the Applicant is shown to be capable of obtaining them by the time required under the Air District's rule.

II. The Staff's Proposed Construction Dust and Particulate Mitigation Measures Are Necessary and Appropriate.

The project is proposed in close proximity to sensitive receptors—the Romoland Elementary School and the community of Romoland. Several nearby residents have expressed concerns about the health effects of the project. The air basin is in nonattainment of the Federal and State ambient PM_{10} standards. (Exhibit 67, p. 5.1-10, Table 2). Existing particulate matter concentrations in the project area are among the highest in the State. Additional particulate matter generated during construction of this project has the potential to add to those already unacceptable levels. Diesel particulate matter is of special concern because it is a carcinogen (HT, p. 219, lns. 7-9) and a toxic air contaminant (Exhibit 67, p. 5.7-9).

In Conditions AQ-SC1 through AQ-SC6, Staff requires both mitigation measures to reduce the production of dust and particulates and personnel and mechanisms for monitoring the effectiveness of those measures. In dispute between the Applicant and Staff are the requirements for diesel engine soot filters in Condition AQ-SC3(o) and an Ambient Air Monitoring Program (AAMP) in Condition AQ-SC5. Both are necessary to help protect the health and safety of the residents in the vicinity.

A. The Diesel Soot Filter Requirement is Reasonable.

In proposed Condition AQ-SC3, Staff proposed specific feasible mitigation measures to minimize project emissions of particulate matter including the control of particulate matter from diesel-powered construction equipment by the use of soot filters. Condition AQ-SC3(o). The Applicant objects to the application of soot filters.

Particulate matter from diesel fuel combustion is a carcinogen that can be reduced with appropriate combustion technology and fuels. The California Air Resources Board and United States Environmental Protection Agency recognize this and have established multi-tier emission standards for particulate emissions from construction equipment. One approach to control the particulate matter is with an add-on soot filter. Because this may not be possible for all engines, Staff's proposed Condition AQ-SC3(o) allows the Applicant to use engines that meet the standard ARB/EPA requirements; for those engines, no soot filter is required. This flexibility allows the Applicant to reduce diesel

particulates in a manner compatible with the equipment and duty cycle. Additionally, if soot filters are found to be impractical, their use is not required by the proposed condition.

The Applicant suggests that compliance with the SCAQMD fugitive dust rule (Rule 403) should be sufficient to mitigate the construction dust impacts. The measures proposed by Staff are more stringent than those contained in Rule 403. This is especially so with regard to diesel equipment emissions, which are not regulated by Rule 403. HT, pp. 223-225.

B. The AAMP Is Necessary to Assure That the Mitigation Measures Are Effective In Protecting the Community From Particulates Generated During Construction.

While Condition AQ-SC3 contains a series of measures to reduce the generation of construction dust (particulate matter), there is some discretion in the application of those measures. To protect the children attending Romoland Elementary School and their families and neighbors it is necessary to measure the effectiveness of those measures and fine-tune their application as necessary to minimize particulate emissions.

Condition AQ-SC5 requires the use of real-time PM10 monitoring instruments in a simultaneous upwind and downwind configuration and a plan for their use in assessing the effectiveness of dust mitigation measures. Use of the data will allow the Applicant to fine-tune its operations to minimize dust emissions. Exhibit 68, pp. 2-3. The human eye is simply not sensitive enough to serve as an instrument for this purpose; particulate concentrations that are of concern may not be visible. HT, p. 217-218.

The Applicant points to other power plant siting cases in support of its argument against the imposition of this Condition. As the Committee has reminded us, however, this project must be measured on its own merits in its own unique setting. In contrast to some of those other cases, this project is proposed in the midst of a rapidly growing residential area. Dr. Greenberg, Staff's Public Health expert, based upon a site specific analysis, supports both the dust and particulate mitigation requirements and the monitoring requirements in AQ-SC5 as necessary to protect the children attending Romoland Elementary School. HT, pp. 314-315. The difficulties with the measuring equipment in the Los Esteros case may be instructive in the design and execution of the AAMP but they do not offer a reason to abandon the monitoring effort. The details of the AAMP are best left to the Applicant and the CPM to work through in the compliance phase.

The Applicant has provided modeling predicting the particulate matter impacts of its construction activities. Staff characterized the estimates of PM_{10} emissions as "assuming the highest level of control." Exhibit 67, p. 5.1-14. In part on the basis of that information, Staff has recommended a finding of no significant environmental impact. Without the AAMP, however, neither the Energy Commission nor the community will be assured that the mitigation measures will be implemented in the most effective way.

C. Staff Agrees to Revise Condition AQ-SC6 to Extend the Permissible Length of Dust Generating Activities From Ten to Twelve Hours Per Day.

At the Evidentiary Hearings Staff agreed to modify Condition AQ-SC6 to allow a twelve hour workday for dust generating activities. HT, pp. 225-226. Prior to the Hearing, we recommended a ten-hour workday. We recommend the modification be as set forth in Attachment B to this brief. We do not recommend either deleting AQ-SC6 in its entirety or simply referring to Condition Noise-8 without explanation as it is important to indicate that there is an air quality component to the operating hour restriction. This is achieved by the clear recognition of a twelve-hour limit in the proposed condition.

III. Staff and the Applicant Have Agreed to Modify Condition COM-8.

At the Evidentiary Hearings Staff agreed to make certain changes to proposed Condition COM-8 to address the Applicant's concerns. The agreed upon revisions are shown on Attachment A. Applicant's counsel has reviewed those revisions and communicated its agreement to Staff.

IV. Staff's Proposed Construction Milestones Condition (COM-15) is Appropriate to Assure Compliance With the Requirements of the Air District's Priority Reserve Program and Timely Construction of the Project.

Under a 1979 Memorandum of Understanding between the Energy Commission and the California Air Resources Board, the decision of the Energy Commission certifying an Application for Certification is supposed to serve as the Authority to Construct that would normally be issued by the local air quality management district. Such is the case with most districts but not with the SCAQMD, which issues its own separate ATC following the Commission's certification.

The Air District cannot issue its ATC until the Applicant pays the fees required for it to use the District's Priority Reserve offset credits for CO and PM10. HT, p. 94, lns. 12-17. As a condition of use of Priority Reserve credits, the Air District's rules require that commercial operation begin within three years of the issuance of Certification by the Energy Commission or the ATC by the Air District, whichever is later. An extension of that deadline can be granted by the Air District's Executive Officer. SCQAMD Rule 1309.1(a)(4)(D).

Proposed Condition COM-15 requires that the Applicant submit a list of project milestones showing how it will construct and bring the project on line in time to satisfy the Air District's Priority Reserve rule. The dispute between Staff and the Applicant is about when that plan should be submitted to the CPM. Staff believes that it should be submitted within 60 days of the Commission's approval of the project. The Applicant prefers to wait until after the Air District issues the ATC. According to the Air District staff, issuance of the ATC could be delayed as long as a year, perhaps even longer, after the Commission's approval, depending on when the Applicant pays the Priority Reserve fees. HT, p. 170.

Issuance of the ATC is largely within the Applicant's control.[2] The work of preparing the ATC has been accomplished as part of the Air District's preparation of the Final Determination of Compliance. All that is required is the Commission's approval of the project and the payment of Priority Reserve fees by the Applicant. HT, p. 166, lns. 7-16.

That the exact date of the issuance of the ATC may not be known within 60 days after Commission approval does not prevent the preparation and submission of list of milestones within 60 days of the Commission's approval. The milestones could be expressed in formulistic terms. For example, the milestone date for obtaining site control could be specified as "60 days after the issuance of the ATC."

There is no reason, then, to postpone the submission of the milestones beyond the Staff suggested 60 days following Commission approval. Their earlier preparation will help assure that the project is expeditiously brought on line to serve the energy consuming public.

V. Conclusion.

Unless the Applicant identifies sufficient first year NOx RTCs and provides evidence of options or other legally binding commitments that will assure that it will be able to obtain those credits, Staff recommends that the Application for Certification be denied. If the required proof of sufficient RTCs is made, Staff recommends approval subject to the Conditions of Certification proposed by Staff, modified as described above.

DATED: August 22, 2003

Respectfully submitted,

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Staff Counsel

[2] The Applicant suggests that it would be premature to presume that it will use the Priority Reserve "before the Applicant has determined whether or not to even use the priority reserve." HT, p. 76, lns. 11-12. The Air District's Final Determination of Compliance assumes and has conditioned the project on the use of the Priority Reserve. There is no option for the Applicant to choose some other offset method on its own initiative. Any such change must be approved by the Commission and the Air District. See Condition AQ-SC9. As presently proposed and conditioned, then, use of something other than the Priority Reserve is not an option.

Attachment A
Amendments to Condition COM-8

COM-8, Construction and Operation Security Plan

Thirty days prior to commencing construction, a site-specific Security Plan for the construction phase shall be developed and maintained at the project site.

At least 60 days prior to the initial receipt of hazardous materials on-site, a site-specific Security Plan and Vulnerability Assessment for the operational phase shall be developed and maintained at the project site. The project owner shall notify the CPM in writing that the Plan is available for review and approval at the project site.

Construction Security Plan

The Construction Security Plan must address:

1. site fencing enclosing the construction area;
2. use of security guards;
3. check-in procedure or tag system for construction personnel and visitors;
4. protocol for contacting law enforcement and the CPM in the event of suspicious activity or emergency; and
5. evacuation procedures.

Operation Security Plan

The Operations Security Plan must address:

1. permanent site fencing and security gate;
2. use of security guards;
3. security alarm for critical structures;
4. protocol for contacting law enforcement and the CPM in the event of suspicious activity or emergency;
5. evacuation procedures;
6. perimeter breach detectors and on-site motion detectors;
7. video or still camera monitoring system;
8. fire alarm monitoring system;
9. site personnel background checks; and.
10. site access for vendors and requirements for vendors delivering acutely hazardous materials, hydrogen gas, and 93% sulfuric acid ~~vendors~~ to conduct personnel background security checks.

In addition, the project owner shall prepare a Vulnerability Assessment and implement site security measures addressing acutely hazardous materials, hydrogen gas, and 93%

sulfuric acid storage and transportation consistent with US EPA and US Department of Justice guidelines.

The CPM may authorize modifications to these measures, or may require additional measures depending on circumstances unique to the facility, and in response to industry-related security concerns. However, the language requirements of COM-8 will be subject to replacement or termination pursuant to the Commission's future rulemaking or other action on security, where power plant owners have the opportunity to review and comment, that will promulgate guidelines applicable to projects under the jurisdiction of the Energy Commission.

Attachment B
Proposed Amendments to Condition AQ-SC6

AQ-SC6 During site mobilization, ground disturbance, and grading activities, the project owner shall limit the fugitive dust causing activities (i.e. scraping, grading, trenching, or other earth moving activities) to no more than a twelve-hour ~~ten-hour~~ per day schedule as provided in Condition **NOISE-8**.

Verification: The project owner shall provide records of compliance as part of the MCR.